1995

State of Utah v. Jason Scott Williams : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS 950057CA

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 950057-CA
v.	:	
JASON SCOTT WILLIAMS,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

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DEFENDANT'S APPEAL OF A CONVICTION FOR ATTEMPTED THEFT BY RECEIVING, A THIRD DEGREE FELONY UNDER UTAH CODE ANN. §§ 76-4-102(3), 76-6-408, 76-6-412(1)(a)(ii) (1995), ENTERED BY THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH, THE HONORABLE HOMER F. WILKINSON, PRESIDING

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Oral Argument **Requested**

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Jason Scott Williams (a/k/a Scott Wilkerson) appeals his conviction for attempted theft by receiving, a third degree felony under Utah Code Ann. §§ 76-4-102(3), 76-6-408, 76-6-412(1)(a)(ii) (1995). The conviction was entered in the Third Judicial District Court, Salt Lake County, Utah, the Honorable Homer F. Wilkinson presiding.

QUESTION PRESENTED
AND
STANDARD OF REVIEW

This case presents but a single dispositive issue, corresponding to Point II of Williams' Brief of Appellant, as follows:

Do state double jeopardy principles allow Williams' circuit court-entered misdemeanor firearms convictions, plus his subsequent district court-entered felony theft conviction, given that all convictions relate to his possession of the same stolen firearm? To the extent necessary, Williams' challenge to the trial court's fact findings, in Point I of his brief, will be

addressed within the State's argument on the above-identified issue. The State agrees that Williams' double jeopardy argument presents a question of law, on which no deference is due to the trial court. *See, e.g., Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 460 (Utah 1989); *State v. Mitchell*, 824 P.2d 469, 471 (Utah App. 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The federal "double jeopardy" prohibition, U.S. CONST. AMEND. V, states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]" Utah's parallel provision, UTAH CONST. ART. I § 12, similarly states, "nor shall any person be twice put in jeopardy for the same offense." Utah's pertinent double jeopardy statutes, Utah Code Ann. §§ 77-1-6(2)(a), 76-1-401, 76-1-402, 76-3-401 (1995), are copied in the appendix to this brief, as is rule 9.5, Utah Rules of Criminal Procedure.

STATEMENT OF THE CASE

Williams was charged with theft by receiving stolen property--specifically, a firearm--a second degree felony, and with carrying a concealed dangerous weapon, a class A misdemeanor (R. 08-09). The concealed weapon charge was dismissed at preliminary hearing (R. 04). Williams moved to dismiss the theft charge on state double jeopardy grounds; that motion was denied (R. 138-39, 171). Williams then entered a conditional guilty plea to attempted theft by receiving, a third degree felony. Williams reserved, under Utah R. Crim. P. 11(i) and *State v.*

Sery, 758 P.2d 935 (Utah App. 1988), the right to pursue his double jeopardy argument on appeal (R. 91, 172-73). Williams was given a suspended zero-to-five year sentence, and placed on probation (R. 99-100).

STATEMENT OF FACTS

Williams was found in the vicinity of an apparent gang-related "shots fired" disturbance in Salt Lake City. An officer responding to the disturbance discovered a loaded, sawed-off shotgun in plain view in an automobile driven by Williams. A subsequent search of the vehicle revealed a loaded pistol hidden beneath the vehicle's floormat. Williams told the officer that the pistol was "probably stolen" (R. 136-37).

Based upon those discoveries, Williams was arrested. The Salt Lake City Attorney charged him with two counts of carrying a loaded firearm in a vehicle, and one count of carrying a concealed dangerous weapon--all misdemeanors under the applicable city ordinances (R. 10). Two days after his arrest, Williams pleaded guilty, in circuit court, to the concealed weapon charge and to one of the loaded firearm charges. The second loaded firearm charge was dismissed (R. 203).

The day following Williams' guilty pleas on the city charges, the Salt Lake *County* Attorney (now Salt Lake District Attorney), having confirmed that the pistol found in Williams' car was stolen, charged Williams with theft by receiving stolen property, a second degree felony because the stolen property was a firearm (R. 08). The county attorney also charged Williams

with carrying a concealed dangerous weapon. The latter charge was dismissed at preliminary hearing, evidently because Williams had resolved it by his guilty plea in the earlier, city prosecution (R. 09, 84, 175).

Williams was bound over to district court on the theft by receiving charge (R. 02-04). In the district court, Williams moved to dismiss that charge as well (R. 25). Williams argued that he could only be prosecuted in a single proceeding for all of the offenses that had prompted his arrest. Because one such proceeding had already been concluded in the circuit court, argued Williams, state double jeopardy principles barred his subsequent prosecution in the district court (R. 25-27). The district court, upon entry of amended findings of fact and conclusions of law, denied the motion to dismiss (R. 136-39). On appeal, Williams renews his double jeopardy argument.

SUMMARY OF ARGUMENT

Because Williams concedes that his "successive prosecution" for theft by receiving was permissible under federal double jeopardy principles, the question before this Court is whether any state law affords him broader double jeopardy protection. Williams mounts no persuasive argument for such protection: under Utah Supreme Court precedent, federal double jeopardy principles also govern state double jeopardy analysis. Further, adoption of Williams' position--which depends upon a repudiated federal view--would create the very legal confusion that Williams decries.

Also under settled Utah law, the theft charge and the firearms charges against Williams stemmed from separate criminal episodes. Therefore, statutory and rule provisions relied upon by Williams, which limit the prosecution of separate offenses committed during a single episode, cannot provide the relief Williams seeks from his conviction for attempted theft by receiving. Finally, even if this Court adopts Williams' legal theory of double jeopardy, Williams' conviction should not be reversed. Instead, an evidentiary remand should be granted, allowing the State to introduce competent evidence in accord with the new double jeopardy rule advocated by Williams.

ARGUMENT

WILLIAMS WAS PROPERLY PROSECUTED FOR THEFT BY RECEIVING, EVEN THOUGH HE HAD ALREADY PLEADED GUILTY TO OTHER CHARGES INVOLVING THE SAME STOLEN FIREARM

Williams concedes that his "successive prosecution" for theft by receiving was permissible under federal double jeopardy principles. *See United States v. Dixon*, 509 U.S. 125, 113 S. Ct. 2849 (1993). In *Dixon*, the United States Supreme Court held that the venerable "same elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932), governs when the government may successively prosecute a person who has already faced charges arising from one course of unlawful conduct. Accordingly, the Court overruled its prior holding, in *Grady v. Corbin*, 495 U.S. 508 (1990), that had more tightly limited the government's ability to bring a successive prosecution.

Because the concealed weapon, loaded weapon, and theft by receiving crimes each contain one or more elements that are not elements of the other crimes, Williams correctly recognizes that there was no federal bar to his subsequent prosecution on the theft by receiving charge (Br. of Appellant at 24). To put the matter more squarely under *Blockburger*: theft by receiving is a separate offense, neither encompassing nor included within the firearms offenses. *See Blockburger*, 284 U.S. at 304 ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"). Therefore, Williams was properly prosecuted for theft by receiving, even though that prosecution was initiated after the firearms offenses were adjudicated.

Given Williams' appropriate concession under federal double jeopardy law, the only question before this Court is whether any state law affords him broader "subsequent prosecution" protection against the theft prosecution. Williams argues that he is entitled to such broader protection under the Utah Constitution, Utah statutes, and under a Utah procedural rule. This Court should reject Williams' arguments.

As explained in Points A through C of this brief, Williams' arguments fail even if he is correct in his factual contention (Br. of Appellant at 10-13) that county prosecutors had evidence to prosecute him for theft by receiving at the time

his firearms offenses were adjudicated in the city prosecution. Only if this Court disagrees with the State's analysis in Points A through C need it address the district court factual error alleged by Williams; that alleged error is discussed in Point D.

A. Core State Double Jeopardy Principles are Construed in Conformity with Federal Law, and therefore Permit Williams' Theft Prosecution.

Similar to the Fifth Amendment to the United States Constitution, article I § 12 of the Utah Constitution provides, "nor shall any person be twice be put in jeopardy for the same offense." A Utah statute, Utah Code Ann. § 77-1-6(2)(a) (1995) proscribes double jeopardy in near-identical terms. In *McNair v. Hayward*, 666 P.2d 321 (Utah 1983), the Utah Supreme Court reviewed a double jeopardy claim under all three of these provisions. The court held: "On the basis of the reported cases, we conclude that all of these guarantees have the same content." *Id.* at 323.

Given *McNair*, Williams cannot claim expanded double jeopardy protection under the Utah Constitution, nor under section 77-1-6(2)(a). This Court is bound by the Utah Supreme Court's explicit pronouncement that these core state protections are construed identically with their federal counterpart. *State v. Menzies*, 889 P.2d 393, 398-99 & n.3 (Utah 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 910 (1995); *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993) (both explaining application of stare decisis to intermediate appellate courts). Additionally, the Utah Supreme Court has consistently approved and applied the

Blockburger double jeopardy analysis. *See, e.g., State v. McCovey*, 803 P.2d 1234, 1235-36 (Utah 1990); *State v. Franklin*, 735 P.2d 34, 35-36 (Utah 1987); *State v. Sosa*, 598 P.2d 342, 345-46 (Utah 1979). Because Williams' successive prosecution was permissible under federal standards, it was also permissible under core Utah double jeopardy principles.

Even if this Court were not bound by *McNair*, Williams' bid for expansive state double jeopardy protection is unpersuasive. His conclusory assertion that the *Blockburger* "same elements" test is "confusing and unprincipled" (Br. of Appellant at 25) is inaccurate. Quite the contrary, as the federal Supreme Court observed in *Dixon*, it was the ruling in *Grady v. Corbin*--which Williams would have this Court adopt as a matter of state constitutional law (Br. of Appellant at 28)--that was "wrong in principle . . . and unstable in application." *Dixon*, 113 S. Ct. at 2863; *id.* at 2860-64 (explaining reasons for overruling *Grady*). Utah courts ought not adopt a constitutional rule that has already been tried and found wanting. *Cf. State v. Scott*, 860 P.2d 1005, 1007 n.3 (Utah App. 1993) (rejecting similar bid to adopt federal Supreme Court minority view as governing state constitutional search and seizure law).

B. Utah's "Single Criminal Episode" Statute Does Not Apply to this Case; Even if Applicable, the Statute Should be Construed to Conform with Federal Double Jeopardy Law.

Williams also invokes Utah Code Ann. § 76-1-402 (1995), which delineates situations when a person may be prosecuted for separate offenses committed during a "single

criminal episode." In essence, section 76-1-402 permits such prosecutions, utilizing a *Blockburger* "same elements" test, in subsection 76-1-402(3)(a), to determine when the offenses are separate. For two reasons, section 76-1-402 does not assist Williams.

1. Separate Criminal Episodes.

First, Williams' reliance on section 76-1-402 is misplaced, because he inaccurately asserts that his firearms offenses and the subsequently-prosecuted theft offense were committed during a single criminal episode (Br. of Appellant at 14-18). The code provision immediately preceding section 76-1-402 defines "single criminal episode" as "all conduct which is closely related in time and is incident to an attempt or accomplishment of a single criminal *objective*." Utah Code Ann. § 76-1-401 (1995) (emphasis added).

Construing section 76-1-401, the Utah Supreme Court found no single objective, and therefore no single criminal episode, in a case where the defendant first stole a police officer's revolver, and then took some hitchhikers hostage during the ensuing police pursuit. *State v. Ireland*, 570 P.2d 1206, 1207 (Utah 1977). Subsequent cases have been in accord. *See, e.g., Hupp v. Johnson*, 606 P.2d 253, 254 (Utah 1980) (separate criminal episodes existed where the defendant was caught driving drunk, and also was driving without a license, registration, or safety inspection); *State v. Cornish*, 571 P.2d 577, 577-78 (Utah 1977) (per curiam) (car theft and subsequent failure to stop at

police officer's command, were separate criminal episodes). *Compare State v. Germonto*, 868 P.2d 50, 59 (Utah 1993) (forgery and murder shared single objective, i.e., "to obtain property of value from" the victim).

Based upon the foregoing authority, it is clear that Williams did not receive the stolen pistol and then commit the firearms offenses in order to accomplish a single objective. The objective of receiving the stolen pistol, as for any theft, was merely to unlawfully acquire the property of another. Utah Code Ann. § 76-6-408(1) (1995). Williams' objectives in secreting the pistol, loaded, in an automobile--whatever they may be--are separate and unrelated to the objective of theft.

And it is highly significant that in *Cornish* and *Ireland*, the Utah Supreme Court held that thefts, even though "closely related in time" to an ensuing sequence of criminal behavior (in fact, precipitating such behavior), were nevertheless separate criminal episodes. As a matter of logic, and consistent with those holdings, Williams had to receive the stolen weapon--thereby completing the crime of theft by receiving--before he could hide it, loaded, in his automobile. *See Cornish*, 571 P.2d at 578 (theft "was a completed offense at the time the car was taken"). Accordingly, even if construed differently from settled double jeopardy law, Utah's "single criminal episode" statute does not apply to Williams' "successive

prosecution" claim, because Williams was prosecuted for separate criminal episodes.[1]

2. Parallel Double Jeopardy Analysis.

Second, even if section 76-1-402 might apply, that statute should be construed in accord with federal double jeopardy law. In *McNair*, discussed earlier, the Utah Supreme Court did not specifically address section 76-1-402. However, because the court did hold that core federal and state double jeopardy principles are to be construed in like fashion, and because the court has repeatedly endorsed the *Blockburger* double jeopardy analysis, it seems safe to infer that section 76-1-402, which incorporates the *Blockburger* "same elements" principle, must also be construed to conform with federal law. Therefore, because Williams' successive prosecution was proper under federal law, it was also proper under section 76-1-402.

C. The Criminal Procedure Rule Relied Upon by Williams Does Not Apply to this Case, Because Williams Was Prosecuted for Separate Criminal Episodes.

In a final argument, Williams argues that rule 9.5, Utah Rules of Criminal Procedure, mandated his prosecution in a single proceeding for theft by receiving and the firearms offenses (Br. of Appellant at 19-22). Rule 9.5 states:

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[1]Williams contends that the conduct or "act" for which he was prosecuted was the police officer's discovery of the firearms and Williams' admission that the pistol was "probably stolen" (Br. of Appellant at 16: "The only 'act' at issue is the discovery of the .357 revolver and the defendant's admission"). Not so. Williams was prosecuted for *his* conduct, not the police officer's discoveries.

> (1)(a) Unless otherwise provided by law, complaints, citations, or informations charging multiple offenses, which may include violations of state laws, county ordinances, or municipal ordinances *and arising from a single criminal episode as defined by Section 76-1-401*, shall be filed in a single court *that has jurisdiction of the charged offense with the highest possible penalty of all the offenses charged*.
>
> (b) The offenses within the complaint, citation, or information may not be separated except by order of the court and for good cause shown.
>
> (2) For purposes of this section, the court that is adjudicating the complaint, citation, or information has jurisdiction over all the offenses charged, and a single prosecutorial entity shall prosecute the offenses.

As the emphasized "single criminal episode" language indicates, rule 9.5 applies only to offenses committed during a single criminal episode. As already explained, reference to Utah Supreme Court case law conclusively demonstrates that Williams' receipt of the stolen pistol was a *separate* criminal episode from the firearms offenses that he then committed with the pistol. Therefore, by its terms, rule 9.5 did not require that Williams be prosecuted in one proceeding for all those offenses.[2]

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[2]Williams tries to improperly graft jurisdiction rules into double jeopardy law (Br. of Appellant at 19-22). If a jurisdictional problem exists, the proper remedy would be to hold void the convictions entered in the court that lacked jurisdiction. *See, e.g., Van Der Stappen v. Van Der Stappen*, 815 P.2d 1335, 1337 (Utah App. 1991) (judgment by court that lacks subject matter jurisdiction is void). In Williams' case, this would void the misdemeanor convictions entered in circuit court, thereby allowing the district court, which has jurisdiction over the felony theft by receiving charge, to assume jurisdiction over all the charges. *Cf.* Utah R. Crim. P. 9.5(a) (charges arising from a single criminal episode are to be prosecuted the court having jurisdiction over the most serious offense).

D. Because Williams' Legal Arguments Fail Even Under His Version of the Facts, the Question Whether the Trial Court's Fact Findings Were Erroneous is Moot; If Not Moot, the Findings Should Either be Upheld, or an Evidentiary Remand Ordered.

The preceding points control this case even if, as Williams contends, Salt Lake County prosecutors had evidence to prosecute the theft by receiving offense at the time he pled guilty to the city-prosecuted firearms offenses (Br. of Appellant at 10-13). To reiterate: there was no constitutional, statutory, or rule-based bar to Williams' successive prosecution for those separate offenses, which were committed during separate criminal episodes. Therefore, this Court need not address Williams' argument that the district court clearly erred when, in denying his motion to dismiss, it found that county prosecutors did not know of the theft when Williams pled guilty to the firearms offenses (R. 137 ¶¶ 2, 6, 7). The question is moot.

The accuracy of the district court's findings becomes a viable issue only if this Court disagrees with the double jeopardy analysis set forth in the preceding points. In that event, this Court should first observe that Williams could not be prosecuted for theft by receiving based solely upon his admission, to the arresting officer, that the pistol was "probably stolen." The "corpus delicti" rule prohibits conviction based solely on an accused's admission, without independent evidence that a crime has been committed. *See, e.g.*,

State v. Johnson, 821 P.2d 1150, 1162-63 (Utah 1991).[3] Therefore, Williams could not be prosecuted for theft by receiving until the theft was independently confirmed. If prosecutors did not receive that confirmation until after the firearms charges were resolved, the subsequent theft prosecution was proper even under Williams' double jeopardy theory.

Under those circumstances, this Court should either affirm the district court's fact findings, or remand the case for an evidentiary hearing to determine precisely when independent confirmation of the pistol theft was received. Affirmance is proper because Williams has not included, in the record on appeal, a transcript of his preliminary hearing on the theft charge. That transcript surely sheds light on when prosecutors confirmed that the pistol was stolen. For failure to provide that transcript, Williams cannot show clear error in the district court's finding on this issue. *See, e.g., State v. Rawlings*, 829 P.2d 150, (Utah App. 1992) (absent adequate record, appellate court presumes correctness of trial court rulings).

But if affirmance is not possible, an evidentiary remand, rather than reversal of the district court's finding, is appropriate. The specificity of the prosecutor's effort to supplement the record with his version of when the pistol theft was confirmed strongly indicates that competent evidence on this

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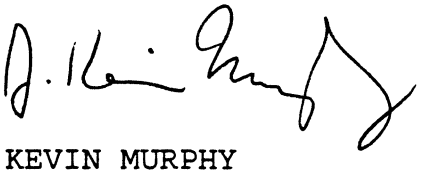
[3]The corpus delicti rule so operates by barring admission of the accused's confession absent the independent corroboration. Thus Williams' confession that the pistol was "probably stolen" would be inadmissible until prosecutors independently confirmed the theft.

question is available. A remand to take that evidence, rather than reversal of the present findings, would be particularly appropriate given that acceptance of Williams' legal theory of double jeopardy would create a new rule of law, which the prosecutor could not have anticipated during the trial court proceedings.[4] "[N]either the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls." *Jones v. Thomas*, 491 U.S. 376, 387 (1989). If this Court adopts Williams' new rule of law, it should grant the State a fair opportunity to comply with that rule.

CONCLUSION

For the reasons set forth in Points A though C of this brief, Williams' conviction should be AFFIRMED. As explained in Point D, the most relief that Williams might expect is an evidentiary remand. Oral argument appears appropriate.

RESPECTFULLY SUBMITTED this 29 day of June, 1995.



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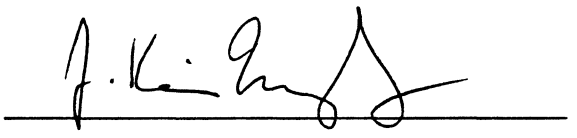
[4]In fact, the county prosecutor argued that even under Williams' version of the facts, his prosecution on the theft by receiving charge, after resolution of the firearm charges, was proper (R. 163-64). And this is not a situation akin to that presented in *State v. Gutierrez*, 864 P.2d 894, 903 & n. 10 (Utah App. 1993), in which the State's remand request was denied because of a prior concession that adverse evidence was accurate. In this case, the parties dispute when prosecutors confirmed that the pistol was stolen.

CERTIFICATE OF MAILING

I certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to RONALD S. FUJINO and ELIZABETH HUNT of SALT LAKE LEGAL DEFENDER ASSOC., attorneys for defendant-petitioner, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 29 day of June, 1995.



APPENDIX

COLLATERAL REFERENCES

C.J.S. — 22 C.J.S. Criminal Law § 21.

77-1-6. Rights of defendant.

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

History: C. 1953, 77-1-5, enacted by L. 1980, ch. 15, § 2.

Cross-References. — Attorneys, rights in disbarment proceedings, § 78-51-16.

Constitutional rights of accused, Utah Const., Art. I, § 12.

Counsel for indigents, § 77-32-1 et seq.

Discharge of defendant turned state's witness, § 77-17-2.

Dismissal without trial, Rule 25, U.R.Cr.P.

Due process of law, Utah Const., Art. I, § 7.

Errors and defects not affecting substantial rights disregarded, Rule 30, U.R.Cr.P.

Husband or wife not competent witness against or for each other without consent, exceptions, § 78-24-8.

Jury trial and waiver thereof, Utah Const., Art. I, § 10; Rule 17, U.R.Cr.P.

Lineup procedures, § 77-8-1 et seq.

Multiple prosecutions and double jeopardy, § 76-1-401 et seq.

Ordinance violation cases, jeopardy in, § 10-7-65.

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—Depositions.
—Right to interpreter.
—Stipulation of testimony.
—Testimony at former trial.
—Testimony at preliminary hearing.
Copy of accusation.
—Bill of particulars.
Double jeopardy.
—Retrial proper.
—Separate offenses.

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law § 227.
C.J.S. — 22 C.J.S. Criminal Law § 203.
Key Numbers. — Criminal Law ⇐ 152.

76-1-305. Lesser included offense for which period of limitations has run.

Whenever a defendant is charged with an offense for which the period of limitations has not run and the defendant should be found guilty of a lesser offense for which the period of limitations has run, the finding of the lesser and included offense against which the statute of limitations has run shall not be a bar to punishment for the lesser offense.

History: C. 1953, 76-1-305, enacted by L. 1973, ch. 196, § 76-1-305.

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law § 225.
C.J.S. — 22 C.J.S. Criminal Law § 198.
Key Numbers. — Criminal Law ⇐ 145½.

PART 4

MULTIPLE PROSECUTIONS AND DOUBLE JEOPARDY

76-1-401. "Single criminal episode" defined — Joinder of offenses and defendants.

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-21-31 in controlling the joinder of offenses and defendants in criminal proceedings.

History: C. 1953, 76-1-401, enacted by L. 1973, ch. 196, § 76-1-401; 1975, ch. 47, § 1.
Compiler's Notes. — Section 77-21-31, cited in this section, was repealed in 1980. For the present comparable provision, see Rule 9, R. Crim. P.

NOTES TO DECISIONS

Analysis

Separate episodes.

—Criminal objectives.

Where defendant committed a robbery in one county, and later, in another county some 65 miles away, picked up two hitchhikers and decided to kidnap them as hostages, the difference in time, location, and the criminal objectives of robbery and kidnapping rendered the conduct separate crimes rather than one single

criminal episode. State v. Ireland, 570 P.2d 1206 (Utah 1977).

The unlawful taking of a vehicle and the failure to stop at the command of a police officer were two separate offenses, and not a single episode, because the two offenses occurred a day apart and the criminal objective in the unlawful taking was to obtain possession while the criminal objective in the failure to stop was to avoid arrest for a traffic violation. State v. Cornish, 571 P.2d 577 (Utah 1977).

—Property pawned separately.

Receipt of property stolen, received, and pawned on three different days did not arise out of a single criminal episode. State v. Tarafa, 720 P.2d 1368 (Utah 1986).

Separate offenses.

Although defendant's crimes were committed during a single criminal episode, he committed two separate burglaries by breaking into two separate, locked portions of an apartment building. State v. Porter, 705 P.2d 1174 (Utah 1985).

Single episode.

Retention of stolen property of different individuals is a single act and a single offense if evidence shows that the items were retained simultaneously. Therefore, where stolen items were the subject of a previous prosecution for related offenses, a second prosecution was precluded. State v. Bair, 671 P.2d 203 (Utah 1983).

Traffic offenses.

This section does not prevent the prosecution of a drunk driving charge under § 41-6-44 after the defendant has pleaded guilty to driving without a license, without a registration certificate and without a safety sticker, since the citations charge separate offenses entirely unrelated to each other. Hupp v. Johnson, 606 P.2d 253 (Utah 1980).

Cited in State v. O'Brien, 721 P.2d 896 (Utah 1986); State v. Larocco, 742 P.2d 89 (Utah Ct. App. 1987); State v. McGrath, 749 P.2d 631 (Utah 1988); State v. Thompson, 751 P.2d 805 (Utah Ct. App. 1988); State v. Ortega, 751 P.2d 1138 (Utah 1988); State v. Johnson, 784 P.2d 1135 (Utah 1989); State v. Lopez, 789 P.2d 39 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law § 20.

C.J.S. — 22 C.J.S. Criminal Law § 14.

Key Numbers. — Criminal Law ⇐ 29.

76-1-402. Separate offenses arising out of single criminal episode — Included offenses.

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

History: C. 1953, 76-1-402, enacted by L. 1973, ch. 196, § 76-1-402; 1974, ch. 32, § 2.

Cross-References. — Computer Crimes Act not to bar prosecution for conduct also violating another statute, § 76-6-704.

Double jeopardy prohibited for same offense, Utah Const., Art. I, Sec. 12; U.S. Const., Amend. V; § 77-1-6.

NOTES TO DECISIONS

Analysis

"Act."

"Act" as used in Subsection (1) includes not only volitional acts of a defendant, but also the number of victims, as each is acted upon by a defendant. State v. Mane, 783 P.2d 61 (Utah Ct. App. 1989); State v. Gambrell, 814 P.2d 1136 (Utah Ct. App. 1991).

Instructions.

Where the greater offense includes all the elements of the lesser offense, an instruction on the lesser offense may be refused if the prosecution has met its burden of proof on the elements of the greater offense and there is no evidence tending to reduce the greater offense; however, if there be any evidence, however slight, on any reasonable theory of the case under which defendant might be convicted of the lesser included offense, the trial court must, if requested, give an appropriate instruction on the lesser included offense. State v. Chesnut, 621 P.2d 1228 (Utah 1980).

Trial court may give a lesser included offense instruction, even over a defendant's objection, if warranted by the evidence and if there is clearly no risk that the defendant will be prejudiced by lack of notice and preparation so as to deprive him of a full and fair opportunity to defend himself. State v. Howell, 649 P.2d 91 (Utah 1982).

Although lesser offense must be necessarily included within charged offense in order to warrant prosecutor's request for lesser included offense instructions, a "rational basis" test is all that is required when instruction is at request of defense. State v. Baker, 671 P.2d 152 (Utah 1983).

In a burglary case, it was not prejudicial error for a trial court to refuse to give instructions on criminal trespass as a lesser included offense, when the evidence supported only the burglary charge. State v. Johnson, 671 P.2d 215 (Utah 1983).

Defendants in a prosecution for second degree murder, who maintained that they did not cause the victim's death, were not entitled to a lesser included offense instruction on manslaughter since their defense would also have required acquittal of manslaughter. State v. Crick, 675 P.2d 527 (Utah 1983).

A lesser included offense shares not only

PART 4

LIMITATIONS AND SPECIAL PROVISIONS ON SENTENCES

76-3-401. Concurrent or consecutive sentences — Limitations.

(1) A court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. Sentences for state offenses shall run concurrently unless the court states in the sentence that they shall run consecutively.

(2) A court shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

(3) A court may impose consecutive sentences for offenses arising out of a single criminal episode as defined in Section 76-1-401.

(4) If a court imposes consecutive sentences, the aggregate maximum of all sentences imposed may not exceed 30 years imprisonment. However, this limitation does not apply if an offense for which the defendant is sentenced authorizes the death penalty or a maximum sentence of life imprisonment.

(5) The limitation in Subsection (4) applies if a defendant:

(a) is sentenced at the same time for more than one offense;

(b) is sentenced at different times for one or more offenses, all of which were committed prior to imposition of sentence for any one or more of them; or

(c) has already been sentenced by a court of this state other than the present sentencing court or by a court of another state or federal jurisdiction.

(6) In determining the effect of consecutive sentences and the manner in which they shall be served, the Board of Pardons and Parole shall treat the defendant as though he has been committed for a single term that shall consist of the aggregate of the validly imposed prison terms as follows:

(a) if the aggregate maximum term exceeds the 30-year limitation the maximum sentence is considered to be 30 years; and

(b) when indeterminate sentences run consecutively, the minimum term, if any, constitutes the aggregate of the validly imposed minimum terms.

(7) When a sentence is imposed or sentences are imposed to run concurrently with the other or with a sentence presently being served, the lesser sentence shall merge into the greater and the greater shall be the term to be served. If the sentences are equal and concurrent, they shall merge into one sentence with the most recent conviction constituting the time to be served.

(8) This section may not be construed to restrict the number or length of individual consecutive sentences that may be imposed or to affect the validity of any sentence so imposed, but only to limit the length of sentences actually served under the commitments.

(9) This section may not be construed to limit the authority of a court to impose consecutive sentences in misdemeanor cases.

History: C. 1953, 76-3-401, enacted by L. 1973, ch. 196, § 76-3-401; 1974, ch. 32, § 7; 1989, ch. 181, § 1; 1994, ch. 13, § 21.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, substituted "30 years imprisonment" for "30 years' imprisonment" in Subsection (4) and substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsection (6).

NOTES TO DECISIONS

ANALYSIS

Commencement of second sentence.
Concurrent sentences.
Consecutive sentences.
Mitigating circumstances.
Sentences imposed by different states.

Commencement of second sentence.

Sentence upon conviction of second offense could not begin later than termination of first; court properly sentenced defendant to serve additional five years on conviction of perjury, to commence upon expiration of life sentence which defendant was already serving. State v. Dodge, 19 Utah 2d 44, 425 P.2d 781 (1967).

Concurrent sentences.

When the trial court declined to determine whether defendant's sentences would run concurrently or consecutively and, instead, left "that decision to the Division of Corrections," the trial court's delegation to the Department of Corrections of the responsibilities given to it under this section was inappropriate, but the error was harmless in light of the express language of the statute, providing that the sentences run concurrently. State v. Hallett, 796 P.2d 701 (Utah Ct. App. 1990), aff'd, 856 P.2d 1060 (Utah 1993).

Consecutive sentences.

The court did not err in imposing consecutive sentences on the defendant for the crimes of aggravated kidnapping and sexual assault, even though both were committed in the course of a single criminal episode, where the evidence clearly showed that a sufficiently substantial period of time had elapsed, both before and after the sexual assault, in which the victim was restrained against her will and subjected to a substantial risk of harm. State v. Jolivet, 712 P.2d 843 (Utah 1986); State v. Stettina, 868 P.2d 108 (Utah Ct. App. 1994).

Trial court did not err in imposing four consecutive sentences for second-degree murder, attempted murder and two counts of aggravated assault arising out of a barroom altercation, because defendant committed four separate and distinct crimes involving different victims. State v. Mane, 783 P.2d 61 (Ct. App. 1989).

This section does not preclude the imposition of consecutive sentences, but merely restricts the effect of consecutive sentences. State v. Swapp, 808 P.2d 115 (Utah Ct. App.), cert. denied, 815 P.2d 241 (Utah 1991).

The purpose of a statute limiting consecutive sentences is to guard against oppressive and inequitably long sentences. State v. Swapp, 808 P.2d 115 (Utah Ct. App.), cert. denied, 815 P.2d 241 (Utah 1991).

This section does not preclude the imposition of consecutive sentences that total more than thirty years, but restricts the actual time served to a maximum of thirty years. State v. Horton, 848 P.2d 708 (Utah Ct. App.), cert. denied, 857 P.2d 948 (Utah 1993); State v. Stettina, 868 P.2d 108 (Utah Ct. App. 1994).

This section does not prohibit the imposition of consecutive sentences not carrying a maximum of life in prison from exceeding thirty years. State v. Deli, 861 P.2d 431 (Utah 1993).

Although the first portion of Subsection (4) limits the aggregate maximum of consecutive sentences to thirty years' imprisonment, when read in conjunction with the second portion, this limitation does not apply if any of the sentences imposed that are part of the consecutive sentence chain authorizes the death penalty or life imprisonment. When seven of nine offenses authorized life imprisonment, Subsection (4) did not apply. State v. Deli, 861 P.2d 431 (Utah 1993).

Mitigating circumstances.

In sentencing 16-year-old defendant who pled guilty to first degree murder, child kidnapping, and aggravated sexual abuse of a child to consecutive sentences, trial court abused its discretion in failing to consider the defendant's rehabilitative needs in light of his extreme youth and the absence of prior violent crimes. State v. Strunk, 846 P.2d 1297 (Utah 1993).

Only young age — not old age — may be a mitigating factor. State v. Nuttall, 861 P.2d 454 (Utah Ct. App. 1993).

Sentences imposed by different states.

Subsection (1), providing that sentences are to run concurrently unless the court states to the contrary in the sentence, does not apply to sentences imposed by two different sovereigns, and, therefore, such sentences should run consecutively unless the sentencing court expressly directs otherwise. State v. Reed, 709 P.2d 391 (Utah 1985).

Amendment Notes. — The 1993 amendment, effective May 1, 1993, designated as "(a)" and rewrote the existing provisions, deleting "other than an infraction" after "offense," and added Subdivisions (b) to (e).

Cross-References. — Counsel for indigent defendants, § 77-32-1 et seq.

Defense costs in criminal actions, convicted defendants may be ordered to pay, § 77-32a-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Determination of indigency.
—Appeal.
Self-representation.

Determination of indigency.

—Appeal.

The determination of indigency is a question of fact to be determined by the trial court; once that determination has been made, it is entitled to the same presumptions of correctness as other trial court findings and determinations; therefore, the person attacking that finding has the burden to prove it is in error. Webster v. Jones, 587 P.2d 528 (Utah 1978).

Self-representation.

Because the exercise of the right to defend oneself in a criminal prosecution necessarily constitutes a waiver of the important right to professional counsel, trial courts have an affirmative duty to determine that a defendant who chooses self-representation does so knowingly and intelligently. State v. Drobel, 815 P.2d 724 (Utah Ct. App.), cert. denied, 836 P.2d 1383 (Utah 1991).

Trial court did not err in allowing defendant to represent himself, after the court properly inquired into defendant's wish to represent himself, and properly took defendant's questionable mental health into account in considering the request. State v. Drobel, 815 P.2d 724 (Utah Ct. App.), cert. denied, 836 P.2d 1383 (Utah 1991).

The choice to represent oneself does not automatically give defendant access to research resources enjoyed by professional counsel. State v. Drobel, 815 P.2d 724 (Utah Ct. App.), cert. denied, 836 P.2d 1383 (Utah 1991).

A foreign-national defendant had a constitutional right to defend himself if he chose to do so, notwithstanding his limited understanding of English and of the U.S. judicial system; the trial court deprived him of that right when it applied an incorrect legal standard, considering the defendant's best interests and his technical ability to manage his own defense. Moreover, because the court's determination that the defendant could not knowingly and intelligently choose self-representation was not supported either by the facts or by any meaningful inquiry into the defendant's ability to understand the risks of self-representation, the case was remanded to allow defendant to represent himself. State v. Bakalov, 849 P.2d 629 (Utah Ct. App. 1993).

COLLATERAL REFERENCES

Utah Law Review. — Judicial Jabberwocky or Uniform Constitutional Protection? *Strickland v. Washington* and National Standards for Ineffective Assistance of Counsel Claims, 1985 Utah L. Rev. 723.

A.L.R. — Relief available for violation of right to counsel at sentencing in state criminal trial, 65 A.L.R.4th 183.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration consequences of guilty plea — state cases, 65 A.L.R.4th 719.

What constitutes assertion of right to counsel following *Miranda* warnings — federal cases, 80 A.L.R. Fed. 622.

Rule 9. Repealed.

Repeals. — Laws 1990, ch. 201, § 2 repealed former § 77-35-9, and thus this rule, effective April 23, 1990. For present comparable provisions, see § 77-8a-1. See also State v. Lee, 831 P.2d 114 (Utah Ct. App.), cert. denied, 843 P.2d 1042 (Utah 1992) (applying § 77-8a-1 instead of this rule, finding that the repeal of the statute operated to repeal the rule).

Rule 9.5. Charged multiple offenses — To be filed in single court.

(1) (a) Unless otherwise provided by law, complaints, citations, or informations charging multiple offenses, which may include violations of state laws, county ordinances, or municipal ordinances and arising from a single criminal episode as defined by Section 76-1-401, shall be filed in a single court that has jurisdiction of the charged offense with the highest possible penalty of all the offenses charged.

(b) The offenses within the complaint, citation, or information may not be separated except by order of the court and for good cause shown.

(2) For purposes of this section, the court that is adjudicating the complaint, citation, or information has jurisdiction over all the offenses charged, and a single prosecutorial entity shall prosecute the offenses.